IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
L.P.A. NO. 20 OF 1997
in
WRIT PETITION NO. 292 OF 1989
in
B.C.C. C. Suit no. 6765 of 1983

1) Smt. Yeshwanti Shrirang Pai)
2) Ramesh Shrirang Pai,)
3) Smt. Purnima Ramnath Pai,)
4) Vishwanath Shrirang Pai)
all residing at Kulkarni cottage)
Gokhale Road Cross Lane, Opp.)
Portugese Church, Dadar, Bombay)
400 028 ...) .. Appellants
vs.
Smt. Sunita Waman Pai,)
residing at Block No.6, 2nd floor,)
Ram Niwas, Agar Bazar, G.K. Bole)
Road, Dadar, Bombay 400 028.).. Respondent

Mr. B. P. Apte with Ms. Anjali Helekar for appellants
Mr. P.K. Dhakephalkar with Ms. M.G. Kulkarni for respondent

CORAM: R.M.S. KHANDEPARKAR
&
SMT. ROSHAN DALVI JJ.
Reserved on 23.3.2006.
DATE OF DELIVERY: 14/06/2006

JUDGMENT (Per ROSHAN DALVI J.)

1. This Letters Patent Appeal is filed by the original defendant in Bombay City Civil Court suit no. 6765 of 1983 against the

order of the learned Single Judge in First Appeal from the judgment and order passed in the aforesaid suit dismissing the said appeal. The aforesaid suit was filed by the Respondent for an injunction against the appellants restraining them from entering upon the suit premises being Block No.6 in Ram Nivas, 2nd floor, Agar Bazar, C. K. Bole Road, Dadar, Bombay 28 and Shop No. 8 in Prajapati Bhavan, Ground Floor, Shivaji Park Road No.4, Dadar, Bombay 28. The said suit was decreed by judgment and order dated 8.2.1989 passed by the Judge, Bombay City Civil Court. The First Appeal therefrom has been dismissed under the impugned judgment and order dated 16.1.1991.

2. The Plaintiff in the suit claimed to protect her possession in the suit premises. One of the suit premises at Ram Niwas, is her residential premises, the tenancy of which stands in her name. The other suit premises is her business premises. The husband of the Appellant and the Respondent were brothers. They were husbands of the Plaintiff and defendant no.1 in the above suit. Both these parties claim through their respective husbands.

3. The original Plaintiff as well as her husband shall be hereinafter referred to as “the Plaintiff”. The original defendant no.1, and the husband of the original defendant no.1 shall be hereinafter referred to as “the Defendants”.

4. The Plaintiff as well as the Defendant came from their native place to Mumbai. Initially they lived with their uncle one Bhalchandra. They carried on grocery business also along with Bhalchandra, despite being salaried workers. This business was carried on in one of the suit premises, Prajapati Bhawan. It is a small premises of 120 sq. ft. They thereafter shifted their residence to Prajapati Bhawan. Both the families continued to live there jointly. They acquired another property in Kulkarni Cottage, Gokhale Road, Dadar Mumbai 400 028. The family thereafter used the said two properties, one for business purpose and one for residential purpose. Prajapati Bhawan which was earlier used for business purpose was later used for residential purpose. Since that was a small premises the Plaintiff is stated to have acquired another premises in Ram Niwas which is one of the suit premises. This was acquired in 1975 on tenancy from one of her

relatives, one Damodar. It is the Plaintiff's case that Rs.10,000/- were paid to Damodar for the furniture which were in the flat.

5. Prajapati Bhawan was the premises in which the Plaintiff carried on business initially with the help of the husband of Defendant no.1. The Defendant is stated to have been residing in Kulkarni Cottage.

6. It is argued on behalf of the Plaintiff that initially there were two premises of the uncle of the Plaintiff and the Defendant which were partitioned by and between them, so that the Plaintiff took Prajapati Bhawan and the Defendant got Kulkarni Cottage. Ram Niwas is claimed to be the separate property later taken on tenancy by the Plaintiff in the year 1975.

7. It is the case of the Defendant that both the properties, Prajapati Bhawan and Kulkarni Cottage were joint family properties and the business was a family business of a grocery store. From the proceeds of the business the third property was acquired by the family *albeit* in the name of the Plaintiff. Hence the Defendant claims rights in the said property Ram

Niwas also. It is their case that the funds for the said property came out of joint family business. They claim that about Rs.55000/- was paid in cash for acquiring the said premises on tenancy in 1975.

8. The Plaintiff has disputed that Ram Niwas is acquired out of joint family funds or that it is acquired by the joint family in the name of the Plaintiff.

9. Neither has the Plaintiff produced any evidence of funds expended for the acquisition of Ram Niwas separately and independently of the Defendant (it being her case that she paid only Rs.1000/- towards furniture), nor has the Defendant shown how the funds of the joint family were expanded for acquisition of Ram Niwas. Consequently the documentary evidence of the parties would be the best guide to determine this fact.

10. The Plaintiff relied upon documentary evidence to show her possession in the suit premises. The Defendant has not challenged the actual possession of the Plaintiff. The Defendant has claimed right, title and interest in the suit premises based upon the claim that it is purchased out of the

joint family funds as averred in para 3 (c) of the written statement. It is also the Defendant' scase that the entire joint family including the Defendant shifted to Ram Niwas. They had a common ration card until 1977 when their names were got deleted and were shown at Kulkarni Cottage by the husband of the Plaintiff.

11.The evidence of the Defendant is that the Defendant resided in Prajapati Bhawan till 1971. Ram Niwas was acquired for payment of Rs.55000/- from the income of the business then carried on in Kulkarni Cottage. The Defendant carried on the business and undertook household expenses. The Defendant managed the shop taking assistance of the husband of the Plaintiff for outside work. The net profit of the shop in Kulkarni Cottage was Rs.2000/- to Rs.3000/- per month in 1971. The Plaintiff's husband took away the profits which were used in the acquisition of the premises in Ram Niwas. Though a note book was produced as Exhibit 12 (colly.) in evidence, no specific profits of the business or its utilization for acquisition of the premises in Ram Niwas was shown by the Defendant.

12.The evidence of the Plaintiff shows that since Prajapati Bhawan was a very small premises where initially the family lived, the Defendant shifted to Kulkarni Cottage to live separately from the Plaintiff and the Plaintiff continued to live in Prajapati Bhawan . Accordingly the family separated taking one premises each.

13.The evidence of the Plaintiff also shows that they had a joint ration card , initially at Prajapati Bhawan. It is continued even after separation. The family took their rations alternately for 15 days. However, a new ration card was made in 1978, when the Defendant took a separate gas connection for which she required a separate ration card at Kulkarni Cottage.

14. The possession of the defendant in Kulkarni cottage is not disputed. It is the plaintiff's evidence that the families were earlier residing in Prajapati Bhavan and carrying on business in Kulkarni cottage after which the plaintiff continued to reside in Prajapati Bhavan and the defendant started to reside in Kulkarni cottage. The family ration card was of Prajapati Bhavan.

15. The documentary evidence of the parties is required to be considered to determine which of the oral case of the parties is correct, since that would exclude the oral evidence.

16. The ration cards of the parties are at exhibits A, U and 25. The ration card of the Plaintiff as well as of the Defendant – exhibit A for the period 1962-64 is at Prajapati Bhavan. The names of the Defendant family were deleted in 1978. The ration card of the Defendant – exhibit 25 was issued in 1978 at Kulkarni cottage after the deletion of the names of the Defendants from the earlier ration card. The ration card of the Plaintiff – exhibit 'U' was issued at Ram Niwas in 1978. The ration shop from which the parties took rations were different, as mentioned in the ration cards. The application for the ration card exhibit 25 made by the Defendants has been signed by Defendant no.1.

17. Defendant no.1 applied for gas connection in 1980 at Kulkarni cottage. The documents Exhibits K, J and L relate to the gas connection. The application exhibit J was made by her in 1981 for gas connection at Kulkarni cottage. Her oral evidence that though her application was for connection at

Kulkarni cottage it was to be used in Ram Niwas is required to be excluded in view of the gas card being issued and used at the Kulkarni cottage premises.

18. Defendant no.1 made an application to the BMC – exhibit H showing her residence at Kulkarni cottage in 1981. That has admittedly been signed by her.

19. The LIC premium receipts – exhibit S in favour of the Defendant was sent at Kulkarni cottage in 1978.

20. Two letters – exhibit R have been addressed to the Defendants at Kulkarni cottage in 1983. Another letter – exhibit 10 has been addressed to Defendant no.3 at Ram Niwas which is care of the Plaintiff and not care of of the Defendants, in 1980- 81.

21. Certain documents of the Defendants show the address at Prajapati Bhavan, the reasons for which have all been considered by the learned trial judge. The Defendants admittedly resided and carried on business at Prajapati Bhavan, earlier. That address appears even to have continued in later letters after the Defendants' family alone shifted to Kulkarni cottage. Apprenticeship card of

Defendant no.4 – exhibit 5 and exhibit 16 issued in 1975 was issued at Prajapati Bhavan because his relationship with the other Defendants was shown to have been strained and the Plaintiff (Waman) had helped him in getting the card. The address of Defendant no.4 in the Bank passbook – exhibit 20 issued in 1976, the blood donation certificate – exhibit 18 issued in 1977, as well as passport of Defendant no.4 – exhibit 17 issued in 1978, is understood to be at Prajapati Bhavan for the same reason that Defendant no.4 had strained relations with the other members of the Defendant's family and slept at Prajapati Bhavan whenever the Defendants quarreled with him. His bank account was not shown by Defendant no.4 to his own mother, Defendant no.1.

22. It can be seen that several of the documents, more specially, exhibits 5, 16, 20, 18, 4 and 17 show the address of Prajapati Bhavan because that address was continued to be shown even after the Defendants shifted to Kulkarni cottage. It is not the Defendants' case that they resided in Prajapati Bhavan after 1975 when those documents were issued.

23. The ESIS card issued to another family member of the

Defendants family one Sasikala, at Prajapati Bhavan in 1975 is also seen tobe the same as old address was continued to be used. For similar reason the marriage certificate of Sasikala – exhibit 19 issued in1982 shows her address at Prajapati Bhavan and does not show the name of her own father therein.

24. Several electoral rolls are produced as exhibits Q1, F, 23, W, V and 4. All the electoral rolls of the Defendants show their address at Kulkarni cottage. The application for electoral rolls signed by Defendant no.1 shows her admission of her residence at Kulkarni cottage since 1971. Her explanation in the evidence that her signature was procured and that she did not know about it has been rightly rejected by the trial judge as well as by the learned Single Judge . In fact the learned trial judge has considered the distinction in the electoral rolls exhibits Q, and Q-1. One Dhobi was shown earlier in exhibit Q-1 in 1972. The Defendant was shown in the entire premises in exhibit Q in 1978. Only electoral rolls W and V show the names of the Defendants also at Ram Niwas. In view of the plethora of evidence showing the residence of the

Defendants in Kulkarni cottage alone after 1971, the addition of their names at Ram Niwas in the later years being 1977 and 1980 are rightly rejected by the learned trial judge. This aspect has been further considered by the learned Single Judge and upon considering all the aforesaid documents together, the case of possession of the Defendants in Ram Niwas by mere entries at Ram Niwas in the electoral rolls of later years relied upon by the Defendants, has been rejected.

25. It can be seen from this documentary evidence considering the years of these documents that from about 1977 the Defendants sought to enter upon Ram Niwas . This was well after acquisition of Ram Niwas by the Plaintiff in her name as tenant. It was well after the Defendants alone were residing in the Kulkarni cottage in which the Plaintiffs claim no rights. Though therefore the families were joint initially they appeared to have accepted one premises each, Prajapati Bhavan for the Plaintiff and Kulkarni cottage for the Defendants, after about 1971. It was only after the Plaintiff acquired the third premises at Ram Niwas that the Defendants appear to have created disputes. Since even then the two

families were cordial , the Defendants sought to enter upon the premises at Ram Niwas. Further, since the Defendants were living and carrying on business of grocery shop initially in Prajapati Bhavan and that address continued after the Defendants moved to Kulkarni cottage in 1971, the Defendants claim rights in Prajapati Bhavan also.

26. This appears to have been precipitated in 1983 when the suit was filed. A N.C. Complaint – exhibit B was initially made by the Plaintiff. The second N.C. Complaint was made precisely on 13.1.1984 after the filing of the suit. The learned trial judge has considered in detail the importance of that date and the two events that transpired at two different places on that day. The Defendants made an application for appointment of Court Commissioner on 13.1.1984. The Plaintiff made the second N.C. Complaint that the Defendant had brought a gas cylinder and tape recorder in Ram Niwas from Kulkarni cottage on 13.1.1984. The appointment of the Court Commissioner was without notice to the Plaintiff. The report of the Court Commissioner shows few articles of

the Defendants in Ram Niwas including gas cylinder and a tape recorder. In the oral evidence the fact that they were brought to Ram Niwas on 13.1.1984 is admitted. One other striking feature is a steel cupboard which seemed to be empty and locked. It was given by the father of Sasikala, (who married Defendant no.2) at the time of her marriage. The evidence shows that she had locked it and gone to her native place and it remained in locked condition for about a year. Had the Defendants been residing in Ram Niwas as claimed by them, the cupboard would have been occupied.

27. Whatever be the oral case of the Defendants, the documentary evidence shows that Prajapati Bhavan was earlier occupied by both the parties before the Defendants shifted their residence to Kulkarni cottage and after which despite continuation of the address on certain documents they did not either reside or carry on business there. The application for gas connection and electoral roll signed by Defendant no.1 as well as ration card itself shows her residence only at Kulkarni cottage. An application made by Defendant no.1 to the BMC specifically shows that aspect.

The Plaintiffs claim no rights therein. The Defendants have shown no rights in the other two premises.

28. Consequently, the Plaintiff's case of protection of her possession in both the suit premises shown to the exclusion of the Defendants as has been correctly considered and concluded by the learned Trial Judge and the learned Single Judge.

29. In the premises the appeal fails. The impugned order of the learned Single Judge and the judgment of the learned trial judge are confirmed. The Defendant no.1 shall pay costs of this appeal to the Plaintiff.

(MRS ROSHAN DALVI J) (R.M.S. KHANDEPARKAR J.)